Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1547

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

HAROLD JAMES BAERT,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILBUR F. LITTLEFIELD, PUBLIC DEFENDER OF LOS ANGELES COUNTY, CALIFORNIA

Laurence M. Sarnoff,
Charles Gessler,
Alan Abajian,
Henry J. Hall,
Deputy Public Defenders

320 West Temple Street, Room 590
Los Angeles, California 90012
Telephone: (213) 974-3074
Attorneys for Respondent

HOPY

QUESTION PRESENTED

Stripped of its rhetoric, the question presented by this case is:

May a judicial change in the law which eliminates an element from the substantive definition of a capital offense be applied retroactively to a crime committed prior to the change in the law, when such retroactive application will have the effect of capitally punishing a crime which was not capital when committed?

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INTRODUCTION

This is a death penalty case. In 1983, the California Supreme Court ruled that intent to kill is an element of "special circumstances," a prerequisite for death penalty eligibility under the California law, which are based on certain felony-murders.

(Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal.Rptr. 79, 672 P.2d 862 (1983).) In November 1987, the California Supreme Court overruled the Carlos decision and ruled that intent to kill is no longer an element of felony-murder based special circumstances. (People v. Anderson, 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306 (1987).)

The case at bar arose in August 1987, and involves alleged felony-murder based special circumstances. The trial court ruled that the Anderson decision would be applied retroactively and that the intent to kill element, which is critical under the bizarre facts of this case, would be retroactively eliminated. The California Court of Appeal ruled unanimously that the intent to kill element could not be retroactively eliminated. The California Supreme Court agreed; not a single justice voted to grant review. This Court has recently denied certiorari in an almost identical case. (Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985), cert. denied, without dissent, 477 U.S. 1032, 106 S.Ct. 1242, 89 L.Ed.2d 350.) This Court should do the same in the case at bar.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, is included in the Appendix to the Petition for Writ of Certiorari (A-1 to A-11), as is the order from the California Supreme Court denying the Petition for Review (A-12). The Court of Appeal's decision now appears as In re Baert, 205 Cal.App.3d 514, 252 Cal.Rptr. 418 (1988).

JURISDICTION

The jurisdictional prerequisites are adequately set forth at pages 4 and 5 of the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved in this case are adequately set forth on pages 5 and 6 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Statement of facts:

From the evidence presented at the preliminary hearing in this case, it appears that respondent acted on a fantasy of having sexual relations with an unconscious nurse by choking the victim - a uniformed medical assistant - into unconsciousness and raping her. During the sex acts, the victim began to awaken from the initial choking, and respondent choked her again, ultimately killing her. Most of the case against respondent is based on his confession in which he denied intending to kill the victim, asserting that his intent was to merely render her unconscious so that he could fulfill his fantasy.

B. Statement of the case:

Respondent is the defendant in the case of People of the State of California v. Harold James Baert, Los Angeles County Superior Court Number A886494, and is charged with violating California Penal Code sections 187 (murder), 261(2) (forcible rape), and 211 (robbery). Additionally, there are two special

circumstances charged pursuant to California Penal Code section 190.2, subdivisions (a)(15) and (17), alleging that respondent murdered the victim while engaged in the commission of the crimes of rape and attempted rape, and that he intentionally killed the victim while lying in wait. The offense is alleged to have occurred on August 21, 1987.

Respondent was arraigned on November 3, 1987. On May 27, 1988, after the commencement of jury selection but before the actual trial, the trial court ruled that it was not going to instruct the jury that intent to kill was an element of the felony-murder based special circumstances even though that was the law at the time the alleged offenses were committed holding that Anderson's overruling of Carlos would be applied retroactively to this case.

On August 1, 1988, respondent petitioned the California Court of Appeal for a writ of habeas corpus challenging the legality of his trial because of the trial court's retroactive application of a change in the law. This petition was granted on

October 26, 1988, and the California Supreme Court denied review on January 19, 1989.

ARGUMENT

The Petition for Writ of Certiorari in this case cites no authority for the proposition it advances: that a state is not bound by its own laws defining the elements of a capital crime. There is a reason for this absence of authority - there is none.

Distilled to its essentials, petitioner's argument urges this Court to demolish several of the cornerstones of our system of laws: that persons are bound by the law whether they consider the law to be reasonable or not; that persons are conclusively presumed to know the law; and that the law is binding on all even though it may be changed in the future.

To accept petitioner's argument, this Court would have to reverse scores of cases stretching across two hundred years. Additionally, if petitioner's argument is accepted, very fundamental rules will be changed. For example, if there is no conclusive presumption of knowledge of the law, then ignorance

of the law will become a defense to criminal charges. If that happens, the State will ultimately have a burden of establishing knowledge of the law beyond a reasonable doubt. (Cf., In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).) If petitioner's theory that only "reasonable" laws are binding, a necessarily subjective notion, then it is a defense that the violator of a law felt that law to be "unreasonable." If that is the law, then there are no laws, only a series of suggested rules that persons are free to follow or ignore at will. Another definition of this is anarchy.

Petitioner's argument guts the entire notion of what laws are all about. Either laws can be relied on and govern the behavior of both individuals and the State or they do not. Petitioner appears to urge that they do not. This is wrong and must be rejected.

I

THE ISSUE IN THE CASE AT BENCH IS NOT OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S ATTENTION

This Court has specified the factors bearing on whether a Petition for Writ of Certiorari should be granted. In Rule 17, this Court has stated that certiorari will be granted only "when there are special and important reasons therefore." The case at bar is simply not special and important; the fundamental legal principles regarding the retroactive application of changes in the law are well established, and the precise application of those principles which is presented in this case will vanish after the final resolution of a series of cases in Los Angeles County.

The issue presented by this case has an unique history. As noted above, the California Supreme Court reversed itself on whether intent to kill was an element of felony-murder based "special circumstances" in November, 1987. Immediately after the reversal became final in the Anderson decision, the California Attorney General's Office issued a directive to all California

District Attorney's Offices stating that retroactive application of Anderson to cases which had arisen between the decision in Carlos and the decision in Anderson (the so-called "window" cases), would be a violation of due process of law. (See, Appendix A to this Opposition.) Shortly after the Attorney General's directive, the Los Angeles County District Attorney's Office issued General Office Memorandum 88-17 (included in Appendix B to this Opposition), concurring with the Attorney General's assessment and instructing its deputies not to argue that Anderson be applied retroactively to the "window" cases. This generated a substantial amount of controversy within the Los Angeles County District Attorney's Office which led to the issuance of General Office Memorandum 88-31, referred to by some deputy district attorneys as the "both sides of our mouth" memorandum. In this memorandum (also included in Appendix B to this opposition), the Los Angeles County District Attorney's Office took the position that if proof of intent is "clear" the prosecutor should urge the application of the Carlos intent-to-

kill rule, but if proof of intent is not clear, the prosecutor should urge that Anderson be applied retroactively.

In its Petition for Review to the California Supreme Court, petitioner stated that there are several pending cases in Los Angeles County which occurred between Carlos and Anderson. The decision in the case at bar will probably not impact many of those cases because few contain a real intent to kill issue and prosecutors will not advocate the retroactive application of Anderson.

Petitioner has not cited a single case from another county in which this issue has arisen. In preparation of the reply to the California Supreme Court, the undersigned contacted representatives of several California public defender offices. In most areas there were no cases which presented the issue of the retroactivity of Anderson. In those counties which reported having such cases, the local district attorneys had followed the California Attorney General's directive, not even suggesting that Anderson be applied retroactively. There appears to be no

county other than Los Angeles in which the district attorney is attempting to do what petitioner is attempting to do. Petitioner has not disputed this. This issue is unique to Los Angeles County and has been resolved by the California courts in accordance with the views expressed by the California Attorney General. That the Los Angeles County District Attorney currently disagrees is insufficient reason to grant certiorari.

II

THE JUDICIAL ELIMINATION OF THE INTENT TO KILL ELEMENT OF CALIFORNIA'S FELONY-MURDER BASED SPECIAL CIRCUMSTANCES MAY NOT BE RETROACTIVELY APPLIED TO RESPONDENT'S CASE

A. Retroactive application of a change in the law which eliminates an element of a capital offense is prohibited by under the ex post facto clause of the United States Constitution.

As this Court has observed, the framers of the United States Constitution thought the prohibition on ex post facto laws to be of such moment that they included two bars on such laws in the Constitution: one which enjoins the Federal government and, unlike many of the federal constitutional restrictions which

have been made applicable to the States only though the operation of the Fourteenth Amendment, one which operates directly against the States. (See, Kring v. State, 107 U.S. 221, 225-226, 2 S.Ct. 443, 27 L.Ed. 507 (1883).)

In 1798, this Court stated that a criminal law would be an illegal ex post facto law if it met any of the following tests:

> "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates the crime or makes it greater than it was when committed; (3) every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed; (4) any law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." (Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).)

This test continues to be applied today. (See, e.g., Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).)

There can be no question but that the California Court of Appeal was correct in holding that the elimination of the intent

to kill element from the felony-murder based special circumstances falls within the ex post facto prohibition: it would clearly make the crime in this case more serious by increasing it from a non-capital homicide to a capital homicide; it would increase the available punishment from a maximum term of 25 years-to-life to death; and it would lessen the evidence that would have to be presented in order to convict respondent of a capital murder by deleting the necessity to prove an intentional killing.

Most commonly, the ex post facto prohibition has operated against legislative attempts to enact retroactive laws. However, this Court has made it abundantly clear that:

> "...an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids....If a state legislature is barred by the ex post facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. ...The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' [citation omitted], must apply to bar retroactive criminal prohibitions emanating from courts as well as legislatures." (Bouie v. City of Columbia, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), emph. added.)

This Court has never wavered from the Bouie rule, which has been followed to invalidate retroactive applications of decisional laws in Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); Palmer v. City of Euclid, Ohio, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971); and Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) (see also, Rabe v. Washington, 405 U.S. 313, 93 S.Ct. 993, 31 L.Ed.2d 258 (1972)), as well as many cases from the lower federal and various state courts. Accepting petitioner's argument will mean overruling not only Bouie and Marks, the leading cases from this Court, but also a substantial body of law from other courts.

B. Petitioner's responses.

Petitioner has proposed two arguments in this Court and another argument below in an attempt to have Bouie and Marks and similar cases overruled: (1) the ex post facto/due process rule asserted in Bouie and Marks cannot apply to respondent because his conduct was inherently wrong, and, therefore, he could not claim to be in a position of relying on the law when

he committed his criminal acts; (2) the California Supreme Court's decision interpreting the California death penalty law as requiring an intent to kill was "unreasonable," and, by extension, not binding; and (3) not raised here but raised below, respondent has not established that he personally relied on the existing law. As the California Court of Appeal ruled, none of these contentions has any merit at all.

C. The malum in se versus malum prohibitum distinction is without constitutional significance.

Petitioner's argument that respondent's constitutional right to notice is not violated because the malum in se nature of his conduct must have placed him on notice that his conduct was illegal has been made before and universally rejected, because of the well-established corollary that a person in entitled to notice of the consequences of his acts. (E.g. Miller v. Florida, supra, 482 U.S. 423; Weaver v. Graham, 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).) The Carlos decision gave notice that a non-intentional killing could not result in the death penalty in California. If there is any validity to the proposition that capital

punishment is justified as a deterrent to crime, that deterrence can occur only in those situations where the criminal was on notice that he could receive the death penalty.

Petitioner's argument was made and specifically rejected in Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985), cert. denied, without dissent, 477 U.S. 1032, 106 S.Ct. 1242, 89 L.Ed.2d 350. In Moore, the prosecution argued that even though there was controlling precedent from the state supreme court to the effect that the defendant's conduct - participation in an armed robbery which led to the accidental death of a victim at the hands of another victim - was not a first degree felony-murder, the defendant must have been on notice that his conduct was illegal, and therefore could not avail himself of the Bouie/Marks rule. The Eighth Circuit held that the controlling precedent from the state supreme court placed the defendant on notice that his conduct could not lead to a first degree murder conviction, meaning that even though the defendant knew that engaging in an armed robbery was illegal, he could not be charged with

knowledge that the accidental killing of a victim by another victim would lead to a first degree felony-murder conviction.

The same is true in the case at bar. Respondent knew that his conduct was illegal. However, at the time of his acts there was controlling precedent from the California Supreme Court to the effect that a non-intentional killing occurring during the commission of a felony was not a capital offense. Therefore, respondent could not have been on notice that an unintentional killing would subject him to the death penalty; the law was clear that it could not.

Significantly, petitioner does not even suggest that a legislature could enact an ex post facto law validly affecting malum in se crimes. That would be clearly illegal. (In re Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890); Miller v. Florida, supra, 482 U.S. 423.) As this Court ruled in Bouie, a state cannot do judicially that which it cannot do legislatively. Therefore, petitioner's "malum in se" argument is contrary to Bouie and the legion of cases which follows it.

No court has accepted the malum in se versus malum prohibitum rationale because it is wrong and inconsistent with the requirement of notice and the prohibition against increasing punishment after the act. Again, to accept petitioner's position, this Court would have to overrule many state and federal decisions on this point, covering both judicial and legislative changes in the law.

D. The "reasonableness" of the intent to kill element is not constitutionally significant.

Petitioner's primary argument is that Carlos was an "unreasonable" decision, and therefore not subject to being relied upon by the citizens of California. This premise is simply wrong; the whole point of the doctrine of stare decisis is that a legal system breaks down if the decisions of the highest courts are not binding and subject to reliance by its citizens. Decisions of courts of appeal and supreme courts do not simply resolve individual disputes, they also make the law.

"Reasonableness" has never been the test, rather - reliance on binding judicial precedent has been upheld regardless of

reasonableness. A contemporary example illustrates this. There has probably been no action taken by the United States in this century that has been more thoroughly repudiated than the internment of Japanese-Americans during World War II. However, this unreasonable action was upheld by this Court twice. (Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 194, 89 L.Ed. 194 (1944); Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943).) Regardless of the fact that this action has been determined to be "unreasonable" over the years (see, e.g., Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987)), the fact that this Court approved it has been a contributing factor to the denial of civil relief for the internees. (See, e.g., Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), rhrg. denied 793 F.2d 304.) The rule of law, not some subjective concept of "reasonableness," is controlling. If that is not the case, citizens are not bound by laws which they subjectively believe to be unreasonable.

In Cole v. Young, 817 F.2d 412 (7th Cir. 1987), the defendant urged that he had been denied due process of law in a state criminal proceeding because state court decisional law in effect at the time of his offense which defined the elements of the crime with which he was charged was not applied to his case. In response to this argument, the State urged that the decision which the defendant was urging was incorrect and restricted by subsequent cases.

The Seventh Circuit rejected this argument and ruled that the defendant was entitled to the benefit of that earlier decision, noting:

> "This argument need not detain us long. It is not our place to determine whether [the earlier case] was correctly decided. Our sole task is to ascertain the applicable Wisconsin law and [the earlier case] was the law at the time of Cole's offense. (Id., at 419, emph. added.)

Indeed, that is exactly the proper test: what was the law when the alleged offense was committed? In the case at bar, the law was that there could be no death sentence under a felony-murder theory for non-intentional killers. That ends the inquiry.

To adopt petitioner's argument, yet another long-established line of cases will have to be overruled.

E. The Carlos decision, which interpreted the California death penalty law as requiring an intent to kill as a prerequisite to capital punishment for felony-murder, was not "unreasonable."

Even if this Court was to accept petitioner's unprecedented claim that only "reasonable" laws are binding, it is clear that the interpretation of California law which included intent to kill as an element of felony-murder based special circumstances was not unreasonable. Indeed, the reasonableness of the whole concept of the death penalty for non-intentional killers has been the subject of heated debate within this Court. (See, Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).)

Petitioner misleads this Court when it asserts that Carlos was based solely on a misreading of this Court's decisions.[1]

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[1] An understanding of exactly what the Carlos opinion said and how it reached the conclusion it did is critical to the proper resolution of the "reasonableness" issue. Petitioner's simplistic explanation of this highly complex decision is misleading and simply inaccurate.

The California death penalty law attempts to satisfy the requirement that there be a "principled distinction" between capital and non-capital murders through the definition of several "special

circumstances," the presence of which allows the imposition of capital sentencing. (People v. Green, 27 Cal.3d 1, 61, 164 Cal.Rptr. 1, 609 P.2d 468 (1980).)

Prior to 1978, California's death penalty law was embodied in a set of Legislatively created statutes, one of which, former California Penal Code section 190.2, subdivision (c), contained two qualifications on felony-murder based special circumstances: the defendant must have been personally present during the act or acts which caused death; and the defendant must have directly committed the death-causing act, or physically aided its commission with the intent to cause death.

In 1978, the entire death penalty law was rewritten by popular initiative. Many of the previous limitations, including the requirement that the murder be wilful, deliberate, and premeditated, the physical presence requirement, and the language relating to intentional killing were absent from the initiative. Carlos v. Superior Court, supra, 35 Cal.3d 131, was the California Supreme Court's attempt to deal with the missing language regarding intent.

In the Carlos opinion, the California Supreme Court discussed several issues in ruling that felony-murder based special circumstances charged under the 1978 death penalty initiative include an intent to kill as an element. The first step was to attempt to determine the intent of the voters in passing the initiative. The voter pamphlet regarding the death penalty initiative stated that the initiative was aimed at changing the physical presence requirement of the earlier death penalty law, but was silent on the intent to kill requirement which was also part of that law. (35 Cal.3d at 143-145, particularly fn. 11, 12 and 13.) In concluding that the death penalty initiative did not include a change in the intent to kill requirement, the California Supreme Court noted:

> "The adoption of a law to permit infliction of the death penalty upon an accidental killer would be a momentous step, raising grave moral questions. Nothing in the ballot arguments suggested that the framers intended to take such a step. [Footnote deleted.] We conclude that the history of the initiative, as well as its wording, supports a construction limiting the felony-murder special circumstances to persons who intend to kill or aid in a killing. (35 Cal.3d at 145.)

The California Supreme Court then undertook to examine the initiative in terms of California's rules of statutory interpretation. It

Rather, Carlos was based almost entirely on an interpretation of the requirements of California law. The discussion of this Court's decisions merely supported the conclusion which was reached on other grounds.

There was nothing which occurred in the period between the Carlos and Anderson decisions to make one believe that

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concluded that application of California's long standing rule that criminal defendants are entitled to the benefit of any reasonable doubt about the construction of a penal law meant that the intent to kill element must still be proven under the death penalty initiative. (35 Cal.3d at 145-147.) In arriving at this conclusion, the California Supreme Court examined the purposes of the felony-murder rule and the death penalty and opined that the purpose of the death penalty law was to distinguish between those murders which are deserving of the death penalty from those which are not, reasoning that application of the death penalty to only those persons who intentionally killed was consistent with that purpose and consistent with traditional rules of statutory construction. (Ibid.)

Lastly, the California Supreme Court discussed this issue in terms of its interpretation of this Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and stated that Enmund could reasonably be interpreted as standing for the proposition that the purposes of the death penalty are not served by putting people to death for killings they did not intend to commit and ruled that allowing this to happen would conflict with the Federal Constitutional requirement that there be a "principled way" to distinguish capital from non-capital murders. (35 Cal.3d, at 147-153.) Later cases characterized this intent to kill requirement as an element of felony based special circumstances. (E.g., People v. Anderson, supra, 43 Cal.3d 1104, 1139.)

Carlos was even erroneous.[2] However, after California's

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[2] Indeed, all of the outward signs were just the opposite. For example, the State petitioned this Court for certiorari in People v. Garcia, 36 Cal.3d 539, 205 Cal.Rptr.265, 684 P.2d 826 (1984), which applied Carlos retroactively, and that petition was denied. (California v. Garcia 469 U.S. 1229, 84 L.Ed.2d 366, 105 S.Ct. 1229 (1985).) Significantly, no justice of this Court voted to grant the petition for writ of certiorari in Garcia. During this interim period, there were no scholarly articles attacking the intent to kill requirement embodied in Carlos as unreasonable and unsupported by the law. As late as December 31, 1985, Justice Mosk, the ultimate author of the Anderson decision wrote an opinion reaffirming Carlos and chiding then-Justice Lucas for his criticism of Carlos. (People v. Hamilton, 41 Cal.3d 408, 439, 221 Cal.Rptr. 902, 710 P.2d 981 (1985), Mosk, J., concurring and dissenting.)

As Justice Broussard noted in his dissent in Anderson, the California Supreme Court reversed thirteen death judgments due to Carlos error. (People v. Anderson, supra, 43 Cal.3d 1104, 1152 and 1152, fn. 2, Broussard, J., dissenting.) As late as People v. Ratliff, supra, 41 Cal.3d 675, the last death penalty reversed for Carlos error, there was only one dissenting justice who was critical of Carlos. Additionally, scores of special circumstance cases in which life imprisonment without possibility of parole was imposed were reversed by the California courts of appeal.This is hardly evidence that Carlos was about to become "unreasonable."

Petitioner makes much of the decisions in Tison v. Arizona, supra, 481 U.S. 137, and Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) as undermining Carlos. Bullock has absolutely no impact on Carlos and the necessary impact of Tison is minimal. In Bullock, the defendant was convicted by a jury of capital murder and, in a sentencing hearing, the jury also found that two statutory aggravating circumstances were true and that they were not outweighed by any mitigating factors. The jury instructions which were given did not require a finding that the defendant either killed or intended to kill as thought to be required by Enmund v. Florida, supra, 458 U.S. 782. This Court's decision in Bullock was procedural, holding that the "intent to kill" issue need not be decided by the jury and could be left to the trial judge or an appellate court to decide. Indeed, the ultimate result in Bullock was an order remanding the

matter to the Federal District Court with directions to issue a writ of habeas corpus vacating the death sentence and leaving the state with the option of reimposing the death sentence after making a finding that Bullock either killed, attempted to kill, or intended to kill. (Cabana v. Bullock, supra, 474 U.S. 376, 390-392.)

Bullock's impact on California law was discussed twice in California legal materials prior to the Anderson decision. In People v. Payne (review granted, opinion published at 195 Cal.App.3d 1495, 223 Cal.Rptr. 458 (1986) to permit tracking pending review), Bullock was discussed in Justice White's dissent from the reversal, and he noted that Bullock would permit an appellate court to make the intent to kill determination if the jury failed to do so. (195 Cal.App.3d at 1505.)

Former California Court of Appeal Justice Robert Thompson described Bullock as affecting only the right to a jury finding at the sentencing phase of a capital trial and noted that it empowers the trial judge to make the intent to kill finding. ("Judicial Independence, Judicial Accountability, Judicial Elections and the California Supreme Court: Defining the Terms of the Debate," 59 So.Cal.L.Rev. 809, 850.) This, he reasoned, called only for a reassessment of Garcia's concepts of harmless error when Carlos error existed, not the intent to kill requirement itself. (Ibid.)

A careful reading of Bullock leads to the conclusion that this Court was not backing away from any intent to kill requirement which may have existed in its jurisprudence at that point. If anything, the Bullock decision reaffirmed the requirement but allowed a broader procedure for fulfilling it. This result is supported by the reaction of California courts to Bullock. Both People v. Burgener, 41 Cal.3d 505, 536-537, 224 Cal.Rptr. 112, 714 P.2d 1251 (1986), and People v. Ratliff, supra, 41 Cal.3d 675 were decided after Bullock and resulted in reversals for Carlos error. Indeed, in Ratliff, the prosecution conceded Carlos error. (41 Cal.3d, at 698.) Furthermore, California courts of appeal still applied Carlos and reversed life without parole judgments based on Carlos error after Bullock was decided. (E.g., People v. Smith, 188 Cal.App.3d 1495, 1505-1516, 234 Cal.Rptr. 1495 (1987); People v. Reynolds, 186 Cal.App.3d 988, 233 Cal.Rptr. 596 (1986); People v. Arreola, 186 Cal.App.3d 1570, 1575-1576, 231 Cal.Rptr. 472 (1986).) It is clear that Bullock did nothing to render reliance on Carlos unreasonable.

The impact of Tison v. Arizona, supra, 481 U.S. 137 on

retention election resulted in the appointment of three new Justices to the Supreme Court, the new Court reexamined the bases of the Carlos decision and "reinterpreted" much of the same material that it had in Carlos. The Court reached the opposite result, reversing Carlos to the extent that it required proof of an intent to kill for actual killers. (People v. Anderson, supra, 43 Cal.3d 1104.[3] Until Anderson was decided, there was

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California's death penalty law turned out to be enormous; it ostensibly precipitated Anderson's reexamination of Carlos. (People v. Anderson, supra, 43 Cal.3d 1104, 1138-1141.) However, when Tison was decided, its necessary impact was minimal. Tison held two things: there is no federal intent to kill requirement for actual killers; and aiders and abettors may be capitally prosecuted if they harbor "reckless indifference" to whether someone dies. Admittedly, this was a retreat from what was stated in Enmund, but it did not mean that Carlos was necessarily undermined. This Court's reading of California law was inconsistent regarding both its requirements and Tison's potential impact. (Compare, 481 U.S. 153, fn. 8, to the dissent of Justices Brennan, Marshall, Blackmun and Stevens, 481 U.S. 175-176, fn. 13.)

[3] At the threshold, the Court examined Enmund v. Florida, supra, 458 U.S. 782 in light of its reading of Cabana v. Bullock, supra, 474 U.S. 376 and Tison v. Arizona, supra, 481 U.S. 137 and decided that it had interpreted Enmund too broadly. (People v. Anderson, supra, 43 Cal.3d 1104, 1138-1141.)

Having decided that one of the "bases" on which Carlos had rested was proven "unsound" (43 Cal.3d at 1141), the California Supreme Court elected to reconsider whether intent to kill is an element of felony-murder based special circumstances. It reanalyzed the language of the voters' pamphlet and the other legislative history surrounding the 1978 death penalty initiative and reached the

absolutely nothing in the law which would have compelled the conclusion that Carlos was wrong, much less unreasonable. Furthermore, even though Anderson overruled Carlos, there is nothing in that decision to indicate that Carlos was unreasonable, contrary to petitioner's assertion. Indeed, Justice Broussard read

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conclusion that nothing in that history or language led to the conclusion that intent to kill was an element of a felony based special circumstance in the case of an actual killer. (43 Cal.3d, at 1141-1148.) Reversing its earlier statements, the new California Supreme Court decided that the language of Penal Code section 190.2 was no longer ambiguous and came to the conclusion that, contrary to the way they had been read previously, the "extrinsic aids" which had previously been used to determine legislative intent now led the conclusion that the voters did not intend to make an intent to kill an element of the felony based special circumstances, (43 Cal.3d at 1142-1143), and that an intent to kill was not necessary to meaningfully distinguish death from non-death cases. (43 Cal.3d at 1143-1146.) The Supreme Court also decided that a death penalty law which killed non-intentional killers was no longer a "momentous step" (saying nothing about "grave moral questions"). (43 Cal.3d at 1145, fn. 8.)

The end result was that Carlos was overruled and, after Anderson, the state need no longer prove an intent to kill as an element of a felony based special circumstance in the case of an actual killer. While Carlos may have had an extreme ultimate result, the reversal of over a dozen death verdicts and the downfall of three California Supreme Court justices, it was a decision that was consonant with all of California's previous death penalty decisions and consistent with the application of California's traditional rules of statutory construction. As Justice Broussard noted, the "political winds" in California may have "gust[ed] in a new direction," but the conclusion reached in Carlos was never unreasonable.

the majority opinion in Anderson as conceding that Carlos was correct when decided. (People v. Anderson, supra, 43 Cal.3d 1104, 1154, Broussard, J., dissenting.)

F. Respondent need not prove "actual reliance" on the law as a condition precedent to asserting that its retroactive modification would deny him due process.

Although not argued directly, petitioner has hinted that a defendant must be able to establish that he actually relied on a law prior to asserting that retroactive application of a change in that law would deny him due process. This argument is both illogical and unsupported by any authority, again because there is none.

It is a fundamental tenant of our law that a person is presumed to know the law when they act. This presumption underlies both the ex post facto/due process prohibition on retroactive application of deleterious changes in the law and rule that ignorance of the law is no defense to a crime. This presumption cannot be eliminated without creating an "ignorance of the law defense."

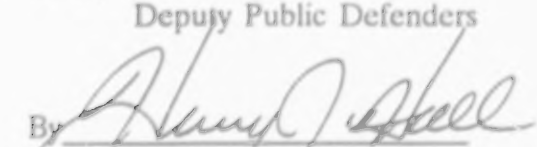
CONCLUSION

Petitioner has proposed that this Court scrap many of the very fundamental rules that govern our system of laws. Why? So that the Los Angeles County District Attorney can defy the legal opinion rendered by the California Attorney General and apply a change in the law retroactively to a small number of cases. This is not a valid reason to rewrite 200 years of law and overrule scores of cases from all levels of state and federal courts. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILBUR F. LITTLEFIELD,
PUBLIC DEFENDER OF LOS ANGELES COUNTY, CALIFORNIA

Laurence M. Sarnoff,
Charles Gessler,
Alan Abajian,
Henry J. Hall,
Deputy Public Defenders

By 
HENRY J. HALL
Deputy Public Defender

APPENDIX A

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE
P.O. BOX 94
SACRAMENTO 94244-
(916) 445-

January 8, 1988

L.A. COUNTY
JAN 1

To: ALL DISTRICT ATTORNEYS

Re: People v. Anderson

In People v. Anderson (1987) 43 Cal.3d 1104, the California Supreme Court overruled its prior decision in Carlos v. Superior Court (1983) 35 Cal.3d 131, insofar as that case had required the jury to find an intent to kill as an element of felony-murder special circumstances for the actual killers. In the wake of Anderson, questions have arisen as to its possible retroactive application, in a variety of procedural situations.

The cases to which Anderson might be applied may be grouped into two classes: (1) those in which the murder was committed before the Carlos decision; and, (2) those in which the murder was committed before Anderson, but after Carlos. The two classes share a number of factual variations; cases in either class might now be in retrial, initial trial, or somewhere in the appellate process. The advice offered in this letter cuts across all such distinctions; within each class, cases may be treated similarly.

Anderson may be fully applied to the pre-Carlos class of cases. The California Supreme Court so applied it in People v. Gates (1987) 43 Cal.3d 1168, to a murder which had been committed in 1979. Even where the case has been remanded in light of Carlos, application of Anderson would likely be appropriate. Nothing in the law of the case doctrine would preclude it. (See People v. Sequeira (1982) 137 Cal.App.3d 898.) If the case is now in trial, a motion to amend the information to allege the special circumstance could be made, assuming proof of same was presented at the preliminary hearing. (Penal Code sec. 1009; Talamantez v. Superior Court (1981) 122 Cal.App.3d 629.)

However, in our judgment Anderson should not be applied to those cases in which the murder occurred in the Carlos-Anderson "window" period. (Marks v. United States (1977) 430 U.S. 188; Bouie v. City of Columbia (1964) 378 U.S. 347.) Marks and Bouie have been applied by the United States Court of Appeals for the

Ninth Circuit to precisely this situation. In United States v. Goodheim (9th Cir. 1981) 651 F.2d 1294, the panel held that an intervening judicial decision interpreting a statute more stringently against the defendant, could not be applied to him. He was entitled to rely on the judicial construction which obtained previously, at the time he committed his crime. (Compare Darnell v. Swinney (9th Cir. 1987) 823 F.2d 299.) Even if a case could survive judicial scrutiny in California state courts, we believe it might be seriously compromised when considered on federal habeas corpus review. Accordingly, we recommend against Anderson's application to such cases.

Should you have questions in this matter, please contact our local death penalty coordinator in your area: DAG Ward Campbell, Sacramento, (916) 324-5251; DAG Dane Gillette, San Francisco, (415) 557-1475; DAG Tom Willhite, Los Angeles, (213) 736-2193; and, DAG Mike Wellington, San Diego, (619) 237-7666.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

STEVE WHITE
Chief Assistant Attorney General

SW:hfw/vdb

APPENDIX B

GENERAL OFFICE MEMORANDUM 88-17

TO: ALL DEPUTY DISTRICT ATTORNEYS
ALL INVESTIGATORS

FROM: GILBERT GARCETTI
Chief Deputy District Attorney

SUBJECT: RETROACTIVITY OF PEOPLE v. ANDERSON
RULE ON INTENT TO KILL

DATE: FEBRUARY 4, 1988

In General Office Memorandum 87-99, dated November 30, 1987, People v. Anderson, 43 Cal.3d 1104, was summarized. Anderson overruled Carlos v. Superior Court (1983) 35 Cal.3d 131, and thereby eliminated the intent-to-kill element of the felony murder special circumstance with respect to the actual killer.

The summary stated that the Anderson rule means that we do not have to prove, at the retrial of a case which has been reversed, that the actual killer had an intent to kill.

The purpose of this memorandum is to modify this statement. The ex post facto clauses of the federal and California constitutions limit the powers of the legislature and do not of their own force apply to the judicial branch. Nonetheless, the principle of fair warning underlying the ex post facto clauses limits the retroactive application of judicial decisions. Due process of law is violated when a defendant is convicted under an unforeseeable interpretation of a statute which expands its scope. (Bouie v. Columbia (1964) 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894; Marks v. United States (1977) 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260.) The due process analog of the ex post facto clauses also applies to special circumstances. (People v. Weidert (1985) 39 Cal.3d 836, 850-851.)

Anderson can be validly applied to cases involving murders which took place before the date Carlos v. Superior Court was decided, i.e., December 12, 1983. Due process of law is not violated by such retroactive application since the offender, i.e., an actual killer whose offense took place before Carlos was decided, cannot reasonably claim that the Anderson holding constitutes an unforeseeable statutory interpretation. (See Forman v. Wolff (9th Cir.

1979) 590 F.2d 283.) The California Supreme Court has retrospectively applied Anderson in People v. Gates (1987) 43 Cal.3d 1168, to a murder which had been committed in 1979. Even where the case has been remanded in light of Carlos, application of Anderson would likely be appropriate. Nothing in the law of the case doctrine would preclude it. (See People v. Sequeira (1982) 137 Cal.App.3d 898.) If the case is now in trial, a motion to amend the information to allege the special circumstance could be made, assuming proof of same was presented at the preliminary hearing. (Penal Code Section 1009; Talamantez v. Superior Court (1981) 122 Cal.App.3d 629.)

On the other hand, a very cogent (although perhaps not conclusive) argument can be mounted to support the proposition that due process of law is violated by the retrospective application of the Anderson holding with respect to intent to kill as to murders which were committed on and after the date Carlos was decided (i.e., December, 1983, but before the date of Anderson (October 13, 1987). (See e.g., Moore v. Wyrick (8th Cir. 1985) 766 F.2d 1253; United States v. Goodheim (9th Cir. 1981) 651 F.2d 1294; but see Darnell v. Swinney (9th Cir. 1987) 823 F.2d 299.)

Because of the high probability of the validity of this argument, it is the policy of this office that the Anderson holding regarding intent to kill will not be relied upon with respect to murders committed on or after December 12, 1983, until the date Anderson was decided, i.e., October 13, 1987.1/

The Attorney General's Office has adopted a position with respect to the retrospectivity of Anderson which is essentially identical with that adopted herein.

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1. It cannot be plausibly argued that the Carlos window extends to the date that Anderson became final (November 12, 1987) because the Anderson decision on October 13, 1987, gives fair notice of foreseeable statutory interpretation.

GENERAL OFFICE MEMORANDUM 88-31

TO: ALL DEPUTY DISTRICT ATTORNEYS (Criminal)

FROM: GILBERT GARCETTI
Chief Deputy District Attorney

SUBJECT: RETROACTIVITY OF PEOPLE V. ANDERSON RULE ON INTENT TO KILL

DATE: MARCH 28, 1988

In People v. Anderson (1987) 43 Cal.3d 1104, the Supreme Court eliminated the intent-to-kill element of the felony murder special circumstance with respect to the actual killer, thereby overruling Carlos v. Superior Court (1983) 35 Cal.3d 131. Anderson clearly applies retroactively to murders committed before the date of the Carlos decision, December 12, 1983, as the murders in both Anderson and People v. Miranda (1987) 44 Cal.3d 57 were committed before this date. (See People v. Easter (1987) 197 Cal.App.3d 183.)

General Office Memorandum 88-17 (February 4, 1988), set forth an office policy that the Anderson holding regarding intent to kill would not be relied upon for murders committed between December 12, 1983, the date of the Carlos decision, and October 13, 1987, the date of the Anderson decision. This time period has been referred to as the "Carlos-window" period. Although the law regarding the retroactivity of Anderson is unclear, we believe such an interpretation is prudent for most cases coming within this time period.

Thus, in a Carlos-window case, if a trial deputy believes the identity of the defendant as the actual killer and the existence of his intent to kill can be proven beyond a reasonable doubt, the deputy should have the jury instructed in accordance with Carlos. This will avoid any potential reversal and retrial because of a Carlos error which was not essential to a conviction.

In some cases coming within this Carlos-window period, the trial deputy may be uncertain whether a jury would reasonably find that the defendant, who was the actual killer, had an intent to kill. In these cases, the trial deputy should argue that Anderson applies retroactively. In our judgment, this is the better view and should be argued when necessary to insure a conviction of the appropriate charges.

A trial deputy advocating the retroactive application of Anderson should attempt to litigate this issue before trial. The prosecutor should amend the

special circumstance allegation to state that the defendant was the actual killer and that he/she had no intent to kill. The trial deputy should explain to the court that this procedure will enable the issue of retroactivity to be settled before trial, as either side may seek appellate review of the trial court's ruling before the trial commences. Thus, the possibility of a retrial on this issue would be avoided.

A prosecutor may amend a pleading any time before the defendant pleads or a demurrer to the original pleading is sustained. Otherwise, the pleading may only be amended with the court's permission. (Pen. Code Section 1009.) If the pleading is amended as suggested, the defense could demur to the complaint on the basis that "the facts do not constitute a public offense," or that "it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." (Pen. Code Section 1004.) Either party may seek immediate appellate review of the trial court's decision. A sample trial brief on this issue will be available from the Appellate Division.

ck